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No. 88-849

In the Supreme Court of the United States

OCTOBER TERM, 1988

ACTION ALLIANCE OF SENIOR CITIZENS OF GREATER PHILADELPHIA, ET AL., PETITIONERS

v.

DAVID NEWMAN, ACTING SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS

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QUESTION PRESENTED

Prior to April 1, 1981, the Federal Reports Act required, among other matters, that the Office of Management and Budget (OMB) review federal agency information collection activities to determine whether the collection of information is necessary for the proper performance of the functions of the agency. In this case, OMB reviewed and disapproved certain provisions of the Secretary of Health and Human Services' (HHS's) general regulations, applicable to all agencies, for compliance with the Age Discrimination Act (ADA). The Secretary then modified his proposed regulations for HHS compliance with the ADA to conform to OMB's disapproval. The question presented is whether the court of appeals correctly upheld those modifications.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-20a) is reported at 846 F.2d 1449. The opinion of the district court (Pet. App. 25a-32a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on May 13, 1988. A petition for rehearing was denied on July 25, 1988 (Pet. App. 21a-24a). On October 18, 1988, Chief Justice Rehnquist extended the time for filing a petition for a writ of certiorari to and including November 22, 1988, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Congress enacted the Federal Reports Act of 1942 (FRA), 44 U.S.C. 3501 *et seq.* (1976), to ensure that in-

formation needed by federal agencies would be obtained with a minimum burden on the business enterprises and other persons required to furnish the information. 44 U.S.C. 3501 (1976). Congress assigned the Director of the Bureau of the Budget the responsibility for implementing the FRA and later reassigned that responsibility to the Director of the Office of Management and Budget (OMB).

As of 1979, the FRA required all federal agencies to submit their plans for the collection of information to the Director of OMB for approval. 44 U.S.C. 3509 (1976). The FRA prohibited an agency from conducting or sponsoring the activity unless the Director had "stated that he does not disapprove the proposed collection of information" (44 U.S.C. 3509(2) (1976)). If the Director determined that the collection of information by the agency was unnecessary, for any reason, the agency could not engage in the collection of information. 44 U.S.C. 3506 (1976).

On December 11, 1980, Congress passed the Paperwork Reduction Act of 1980 (PRA), Pub. L. No. 96-511, 94 Stat. 2812, with an effective date of April 1, 1981. The PRA amended the FRA to "strengthen the clearance process." S. Rep. No. 930, 96th Cong., 2d Sess. 13 (1980). The PRA is basically similar to the FRA, but it adds new requirements and sets forth OMB's authority and responsibilities with greater clarity and detail. For example, the PRA, unlike the FRA, requires OMB to file public comments on any agency's proposed rule requiring the collection of information and provides that the ultimate decision to approve or disapprove the request must be made publicly available. 44 U.S.C. 3504(h) (4) & (6). The PRA also provides that the Act shall not increase or decrease the authority of OMB "with respect to the substantive policies and programs of departments, agencies and offices, in-

cluding the substantive authority of any Federal agency to enforce the civil rights laws." 44 U.S.C. 3518(e).

2. The Age Discrimination Act of 1975 (ADA), 42 U.S.C. 6101 *et seq.*, prohibits discrimination on the basis of age in programs or activities receiving federal financial assistance. See 42 U.S.C. 6102. The Secretary of Health and Human Services (HHS) oversees this aspect of the ADA and is responsible for issuing general government-wide regulations that serve as a model for each federal agency that administers a program of federal financial assistance. 42 U.S.C. 6103(a). Each agency, including HHS, then issues regulations, specific to the agency, for implementing the ADA. 42 U.S.C. 6103(a)(4).

On June 12, 1979, the Secretary of HEW (HHS's predecessor) published final government-wide ADA regulations. 44 Fed. Reg. 33,776. They contained a provision, 45 C.F.R. 90.43(b), stating that all agencies must require a self-evaluation from all recipients of federal aid within a specified time frame. In this self-evaluation, each recipient would be required to identify and justify each age distinction imposed in the program or activity. Following the publication of the final government-wide regulations, the Secretary submitted the self-evaluation requirement to the Director of OMB for FRA review.

On September 24, 1979, the Secretary published a notice of proposed rulemaking for agency-specific regulations implementing the ADA with respect to financial assistance programs administered by HHS. 44 Fed. Reg. 55,108. The proposed regulations included a provision, patterned on the requirements of the general regulations, that would have required all recipients of federal financial assistance under programs administered by HHS to complete a self-evaluation within 18 months of final promulgation of the HHS-specific regulations. 44 Fed. Reg. 55,115.

On February 20, 1980, OMB exercised its authority under the FRA to disapprove the general government-wide regulations' self-evaluation requirement. Pet. App. 27a, 48a-49a. OMB explained that HHS had "failed to show the practical utility of the requirement," that HHS had "not looked at alternative methods to heighten awareness of the provisions of the Act without levying a recordkeeping requirement," and that OMB was "unable to estimate the burden the requirement would impose since the supporting statement says 'little is known about the number of age policies an average recipient imposes . . .' " (*ibid.*). OMB further stated that it believed that other means existed to satisfy the objective of the self-evaluation provision that would not be as burdensome or costly; however, if it were shown at a later date that non-compliance with the ADA was a serious problem, it would reconsider the request (*id.* at 49a). OMB's disapproval thus invalidated the general government-wide self-evaluation requirement. See 44 U.S.C. 3506 (1976).

HHS published its final HHS-specific regulations on December 28, 1982. See 47 Fed. Reg. 57,850. Since HHS's general regulations were to provide the model for the agency-specific regulations, and OMB had disapproved the general regulations' mandatory self-evaluation requirement, HHS modified its proposed agency-specific self-evaluation requirement to comport with OMB's disapproval. The final regulation required a self-evaluation only when HHS requested it in connection with a complaint investigation or compliance review. See 45 C.F.R. 91.33(b).[1]

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[1] HHS explained that this change was necessary "to be consistent with the requirements of the Paperwork Reduction Act of 1980" (47 Fed. Reg. 57,852 (1982)). OMB had disapproved the general regulations pursuant to its authority under the FRA, but the FRA had since been replaced by the PRA, and HHS accordingly cited that statute.

3. Petitioners brought this action in the United States District Court for the District of Columbia to challenge the HHS-specific regulation. They argued (among other contentions that are not pressed here) (1) that HHS's general government-wide regulations required that the agency-specific regulations contain a mandatory self-evaluation requirement and (2) that Section 553 of the Administrative Procedure Act, 5 U.S.C. 553, required HHS to provide notice and opportunity for comment before it modified its proposed agency-specific rule. The district court ultimately rejected both of those contentions. Pet. App. 25a-32a.[2] The court concluded that OMB acted within its authority under the FRA when it disapproved the self-evaluation provision of the government-wide regulation (Pet. App. 28a) and that HHS properly conformed the agency-specific regulation to that disapproval (*id.* at 28a-29a). The court further concluded that HHS was not obligated to provide additional notice and opportunity for public comment when it made that conforming change because the change was a "logical outgrowth" of the proposed rule (*id.* at 30a-31a).

The court of appeals affirmed the district court's decision. Pet. App. 1a-17a. The court agreed that OMB acted within its authority under the FRA in disapproving the general regulation's mandatory self-evaluation requirement and that since the disapproval denied legal effect to the provision, there was no inconsistency between the

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[2] The government initially moved to dismiss the petitioners' claims on the ground that they had not alleged sufficient injury to their interests to establish standing. The district court adopted the magistrate's recommendation that petitioners lacked standing to challenge the HHS regulations. However, the court of appeals reversed and remanded to the district court for further proceedings. *Action Alliance of Senior Citizens* v. *Heckler*, 789 F.2d 931 (D.C. Cir. 1986).

government-wide and the HHS-specific regulations (*id.* at 4a-10a). The court also concluded that HHS's modification of the self-evaluation requirement was a logical outgrowth of its proposed regulation that did not require additional notice and opportunity for comment (*id.* at 10a-13a), and that HHS was "clearly justified in its implicit view that the plausible benefits of a new round of commentary could not justify the delay" (*id.* at 12a). Judge Wald dissented in part (*id.* at 18a-20a).[3]

ARGUMENT

Petitioners repeat the contentions, rejected twice below, that OMB lacked authority to disapprove the Secretary's mandatory self-evaluation requirement and that the Secretary should have provided notice and allowed additional comment before modifying its agency-specific regulation to conform to OMB's disapproval. Both of those contentions are incorrect. Petitioners' challenge to OMB's disapproval does, however, raise issues related to the government's petition for a writ of certiorari in *Dole* v. *United Steelworkers of America,* No. 88- ____ (filed Feb. 27, 1989). We therefore suggest that the Court hold this petition pending its resolution of the government's petition for a writ of certiorari.

1. Petitioners contend (Pet. 8) that OMB lacked authority under the FRA to review agency information collection activities that do not involve physical delivery of information to an agency. The court of appeals correctly rejected this contention as "pure pettifoggery" (Pet. App.

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[3] Judge Wald agreed that OMB lawfully disapproved the general regulation's mandatory self-evaluation requirement, but she believed that HHS should have sought additional comment on its modification of the agency-specific self-evaluation requirement (Pet. App. 18a-20a).

8a). Petitioners cite nothing in the FRA to support their contention. As the court explained, petitioners "cannot seriously believe that in enacting the Reports Act Congress was concerned solely or primarily with private parties' costs of *mailing* data to Washington; it is the record-keeping and data-gathering that constitute the burden" (*ibid.*). Indeed, OMB and its predecessor, the Bureau of the Budget, have consistently interpreted the term "collection of information" to include recordkeeping and data-gathering regardless of whether the records or data are sent to the agency (*ibid.*). The agency's longstanding reasonable interpretation is, of course, entitled to deference. See *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-845 (1984).

Petitioners also contend (Pet. 9) that "OMB's power to disapprove cannot extend absolutely to a substantive regulation entrusted by law to the Secretary." The court of appeals correctly rejected that contention as well. See Pet. App. 10a. Petitioners rely on Section 3518(e) of the PRA, which states that "[n]othing in this chapter shall be interpreted as increasing or decreasing the authority" of OMB with respect to "the substantive policies and programs" of other agencies. 44 U.S.C. 3518(e). But this case was decided under the FRA, which does not contain that provision. Moreover, OMB did not call into question the Secretary's substantive policies with respect to age discrimination; OMB's disapproval of the self-evaluation requirement was based on its conclusion, pursuant to 44 U.S.C. 3506 (1976), that the Secretary could use other less burdensome methods to achieve his policy objectives. Pet. App. 48a-49a.

In any event, petitioners' FRA contentions do not warrant this Court's review because the PRA, which sets forth OMB's review responsibilities in far greater detail, has now replaced the FRA. Any questions concerning OMB's

paperwork review authority should be evaluated in a case involving the presently operative statute.

2. Petitioners' contention (Pet. 7, 13-14) that the Secretary should have provided additional notice and opportunity for comment before promulgating its final HHS-specific regulation is also without merit. Petitioners, citing this Court's decision in *Motor Vehicle Mfrs. Ass'n* v. *State Farm Mutual Automobile Ins. Co.*, 463 U.S. 29 (1983), contend that the court allowed "a bypass of standards established by this Court for an agency's rescission of regulations under the Administrative Procedure Act" (Pet. 7). But, as the court of appeals explained (Pet. App. 10a-12a), this case does not involve a rescission of a final HHS-specific regulation; instead, it involves "a change in rules between proposal and final adoption" (*id.* at 11a).

It is well settled that an agency can alter a proposed regulation during that period between proposal and final adoption without a second round of notice and comment if the changes are a logical outgrowth of the proposal or if the advantages of additional comment are outweighed by the public interest in expedition and finality. See *id.* at 11a-12a. See, *e.g.*, *Small Refiner Lead Phase-Down Task Force* v. *EPA*, 705 F.2d 506, 547 (D.C. Cir. 1983). As the court of appeals explained (Pet. App. 12a-13a), the Secretary's changes here were a logical outgrowth of the general regulatory developments, and additional comment would not have been a fruitful endeavor. The court's determination, which simply involved the application of a well-settled principle of administrative law to a particular rulemaking, does not warrant this Court's review.

3. Petitioners also contend (Pet. 10-13) that the court of appeals' resolution of the FRA issues "creates a serious conflict in principle" with the Third Circuit's decision in *United Steelworkers of America* v. *Pendergrass*

(*USWA III*), 855 F.2d 108 (1988), which effectively invalidated OMB's disapproval, under the PRA, of certain provisions of the Secretary of Labor's hazard communication standard. Petitioners apparently recognize that since *USWA III* involves interpretation of the PRA, while the present case involves interpretation of the now rescinded FRA, there is no square conflict between the two cases. We agree, however, that the two cases are difficult to reconcile.

The government has filed a petition for a writ of certiorari seeking this Court's review of the *USWA III* decision. See *Dole* v. *United Steelworkers of America,* No. 88-____ (filed Feb. 27, 1989). That petition, unlike the petition here, would allow the Court to examine OMB's authority under the PRA—the presently operative statute. Since the outcome of that examination could shed light on the present case, we suggest that the Court hold the petition for a writ of certiorari here pending the final resolution of the government's petition.

CONCLUSION

The petition for a writ of certiorari should be held and disposed of in light of the Court's resolution of the petition for a writ of certiorari in *Dole* v. *United Steelworkers of America,* No. 88- ____ (filed Feb. 27, 1989).

Respectfully submitted.

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